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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 152

ROBERT WAYNE PATTERSON
Petitioner,

versus

HUMBLE OIL AND REFINING COMPANY and
ESSO JAMESTOWN,
Respondents.

Petition For A Writ Of Certiorari To The
United States Court of Appeals For The Fifth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No.

ROBERT WAYNE PATTERSON,
Petitioner,

versus

HUMBLE OIL AND REFINING COMPANY and
ESSO JAMESTOWN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLES THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Robert Wayne Patterson, prays that a *writ of certiorari* issue to the United States Court of Appeals for the Fifth Circuit to review the decision of that Court rendered in this cause on February 27, 1970.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, not yet reported, is printed in Appendix "A" hereof.

The denial of rehearing by the Court of Appeals for the Fifth Circuit is printed in Appendix "B" hereof.

The opinion of the United States District Court for the Eastern District of Louisiana, Baton Rouge Division, reported at 274 F.Supp. 854, is reprinted in Appendix "C" hereof.

JURISDICTION

Original jurisdiction in the District Court was founded upon 28 U.S.C., §1333(1), as a case of admiralty and maritime jurisdiction.

This Honorable Court's jurisdiction is invoked under the provisions of 28 U.S.C., §1254(1).

THE QUESTION PRESENTED

> Does the owner of a vessel "in navigation" warrant its seaworthiness uniformly to longshoremen and to repairmen, or is the owner's obligation to repairmen limited to unseaworthy conditions that do *not* arise out of performance of the repair work?

STATEMENT OF THE CASE[1]

Petitioner instituted this action for damages for personal injuries that he sustained aboard respondent's vessel, ESSO JAMESTOWN, alleging that his injuries

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[1]Unless otherwise indicated the Statement of the Case is as set forth by the Court of Appeals for the Fifth Circuit; Appendix A.

were caused by unseaworthiness of the vessel and by the negligence of respondent's employees.

Petitioner was injured when a shaft bearing cap, weighing some 500 pounds, fell from atop the shaft and struck his foot.

The ESSO JAMESTOWN, on its arrival in Baton Rouge, Louisiana, was experiencing overheating problems with one of its main shaft bearings. The vessel's crew had already removed the top half of the bearing (the bearing cap) in order to attempt to determine the cause of the difficulty. Inspection disclosed apparent damage to the babbit surface of the bearing that would require repair. Petitioner's employer, Yaun Welding and Machine Works, Inc., was engaged by respondent, Humble, to repair the bearing and Yaun sent a gang of men, including petitioner, aboard the ship. Knowing that the bearing cap would have to be removed, the ship's crew had left it off, but had secured it suspended a fraction of an inch above its normal position on the shaft by a chain fall.

During their course of the work, the Yaun crew lowered the cap onto the shaft and removed the chain fall, thus leaving the cap unsupported on the rounded shaft. The cap remained in this precarious position for about three hours while other work continued. Yaun's foreman then ordered petitioner to rig a bridle to the bearing cap so that it could again be lifted by a chain fall and placed on the deck where repairs on the cap could be carried out. While attempting to thread the bridle through an eye bolt on top of the bearing cap, petitioner slipped and fell and, as he did,

the bearing cap rolled off the shaft and struck his foot.

After trial, the District Court dismissed petitioner's entire claim, holding that respondent was not negligent, that petitioner's injury was caused by "operational negligence" and not by unseaworthiness, as well as by his own contributory negligence and, alternatively, that no warranty of seaworthiness extended to petitioner regarding the condition of the unsecured bearing cap because his injury was caused by the very defect he had come on board to repair.

On appeal, petitioner did not challenge the District Court's finding of no negligence on respondent's part, nor did petitioner dispute the Court's finding that the cap was negligently placed in an unsafe position during the course of the repairs at the direction and under the supervision of his employer, Yaun. Instead, petitioner contended that the unsafe condition of three hours' direction constituted "unseaworthiness" as a matter of law and that he should not have been held to have been contributorily negligent since he was ordered to work on re-securing the chain fall to the bearing cap by his superior, the foreman; alternatively, petitioner contended that the Trial Court's finding that he was injured by the very unseaworthy condition he was aboard to repair was clearly erroneous because the Court had found specifically that this condition did not exist at the time the Yaun crew came aboard the vessel.[2]

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[2]Statement of Points Relied Upon for Appeal; R.pp. 337-338; Trial Court's Finding of Fact No. 6, Appendix C, p. 27.

The Court of Appeals sidestepped the unseaworthiness *vel non* and the "operational negligence" issues by holding that the unsafe condition did not constitute unseaworthiness *because* "no duty of seaworthiness existed regarding the transitory condition."[3] The decision of the Court of Appeals was rendered February 27, 1970; rehearing was denied April 10, 1970.[4]

REASONS RELIED ON FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Fifth Circuit deals with an important aspect of the general maritime law of the United States, to wit: the extent of a shipowner's warranty of seaworthiness to harbor workers other than longshoremen who are injured aboard vessels "in navigation."

The effect of the decision is to place upon the obligation of seaworthiness, recognized in *Seas Shipping Co. v. Sieracki*,[5] a limitation not intended by this Honorable Court in *Pope & Talbot v. Hawn*,[6] by the Court of Appeals' reliance upon *criteria* held to be irrelevant by this Court in *Alaska Steamship Co. v. Petterson*,[7] *Rogers v. U.S. Lines Co.*[8] and in *Mitchell v. Trawler Racer, Inc.*[9]

The decision of the Court of Appeals has decided an important federal question in a way which conflicts

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[3]Appendix, page 15 of the Court of Appeals' opinion.
[4]Appendix A, page 12; Appendix B, page 19.
[5]328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946).
[6]346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1954).
[7]347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 799 (1954).
[8]347 U.S. 984, 74 S.Ct. 849, 98 L.Ed. 1120 (1954).
[9]362 U.S. 539, 80 S. Ct. 926, 4 L.Ed. 2d 941 (1960).

with applicable decisions of this Honorable Court and, therefore, the petition merits favorable consideration.

ARGUMENT

As noted in petitioner's statement of the case, his claim for damages originally was founded upon dual legal theories: (1) that the vessel owner was negligent; and (2) that the ship was "unseaworthy." This petition challenges only the disposition made of the claim based upon the alleged breach of the warranty of seaworthiness and, specifically, the holding of the Court of Appeals that:

> "On these limited facts, no duty of seaworthiness existed regarding the transitory condition."[10]

The "limited facts" are: that petitioner's injury was caused in part by an admittedly unsafe condition of some three hours' duration, arising out of repair work by petitioner's employer aboard respondent's vessel that had not been withdrawn from commerce but remained a vessel in navigation at all times pertinent to this suit."[11]

In *Seas Shipping Co. v. Sieracki*,[12] this Honorable Court decided that a vessel owner owed to longshoremen the same warranty of seaworthiness that the maritime law recognized in favor of seamen. In *Waldron*

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[10]Appendix A, page 15 of the Court of Appeals' opinion.

[11]Trial Court's Finding of Fact No. 20, Appendix C, p. 31; See also, *Roper v. U.S.*, 368 U.S. 20, 82 S.Ct. 5, 7 L.Ed.2d 1 (1961).

[12]Supra, Note 5.

v. Moore-McCormack Lines,[13] the Court held that breach of the seaworthiness warranty may result from the misuse of ship's equipment.

In *Pope & Talbot v. Hawn*,[14] this Court held that a ship repairman was entitled to the same protection from unseaworthiness that was recognized in *Sieracki*, *supra*, and declined to discriminate against maritime workers on the flimsy basis of job nomenclature.

If, therefore, longshoremen and ship repairmen are to be given rights and remedies equal to those of seamen for shipboard injuries due to unseaworthiness, petitioner should not have been denied relief.

Apparently, the Court of Appeals reasoned that, since Patterson's injuries occurred out of unseaworthiness (called an "unsafe" and a "transitory" condition) arising out of the performance of the repair contract, petitioner's work was, therefore, not within the shipowner's "control" and for that reason the vessel did not warrant its seaworthiness as to work-created conditions.

But, in *Alaska Steamship Co. v. Petterson*,[15] according to *Mitchell v. Trawler Racer, Inc.*,[16] this Honorable Court held that:

> "There is no suggestion in any of the decisions that the duty [to furnish a seaworthy ship] ...

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[13]386 U.S. 724, 87 S.Ct. 1410, 18 L.Ed. 2d 482 (1967).
[14]*Supra*, Note 6.
[15]*Supra*, Note 7.
[16]*Supra*, Note 9.

> is any less with respect to an unseaworthy condition which may be only temporary. Of particular relevance here is *Alaska Steamship Co. v. Petterson, supra.* In that case the Court affirmed a judgment holding the *shipowner liable for injuries caused by defective equipment temporarily brought on board by an independent contractor over which the owner had no control.* That decision is thus specific authority for the proposition that *the shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to liability.* That decision also effectively disposes of the suggestion that liability for a temporary unseaworthy condition is different from the liability that attaches when the condition is permanent."[17] (Emphasis added)

In the event it may be thought that petitioner's case is factually distinguishable from *Pope & Talbot v. Hawn, supra,* because the unsafe condition by which Hawn was injured did not arise out of the contractual undertaking of his employer, petitioner submits that this is a distinction without a legal difference.

In *Alaska Steamship Co. v. Petterson* and *Rogers v. U. S. Lines Co., supra,* the unseaworthiness arose out of performing the stevedoring contracts and consisted of defective appliances supplied by the injureds' employers pursuant to their contractual obligations.

In *Crumady v. The Joachim Hendrik Fisser*[18] and

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[17] 362 U.S. at pp. 549-550.
[18] 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed. 2d 413 (1959).

in *Mascuilli v. U. S.*,[19] this Honorable Court imposed liability on vessel owners for unseaworthiness "brought into play" in the course of the stevedoring operations by longshoremen, one of whom was injured.

Therefore, if a vessel owner is liable to a longshoreman for injuries occasioned by unseaworthiness arising during and out of the performance of a stevedoring operation, a ship repairman injured aboard a vessel "in navigation" by conditions arising out of performance of the repair contract should likewise be protected by the seaworthiness warranty as to such conditions. *Pope & Talbot v. Hawn, supra.*

West v. United States,[20] upon which the Court of Appeals for the Fifth Circuit seems to have placed strong reliance, does not support the denial of petitioner's claim for at least one significant reason: the District Court in petitioner's case found that respondent had *not* withdrawn the S/S ESSO JAMESTOWN from commerce (the vessel had her full crew aboard) and that the ship remained a vessel "in navigation" at all times pertinent to petitioner's suit.[21] Whereas, in *West, supra*, the entire *rationale* of the Court's denial of a seaworthiness warranty was predicated upon its conclusion that the vessel there involved was not in maritime service, i.e., had been withdrawn from commerce and was not "in navigation" at the time West was injured. Indeed, the language quoted by the

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[19] 387 U.S. 237, 87 S.Ct. 1705, 18 L.Ed. 2d 743 (1967).
[20] 361 U.S. 118, 80 S.Ct. 189, 4 L. Ed. 2d 161 (1959).
[21] Trial Court's Finding of Fact No. 20, Appendix C, p. 31; *cf:* Roper v. U. S., *supra*, note 11.

Court of Appeals for the Fifth Circuit[22] from the *West* case dealt only with the two-faceted aspect of West's *negligence* theory of liability and, thus, has no relevance, *per se*, to petitioner's claim based upon breach of the seaworthiness warranty.

This is not a case in which so-called "Operational Negligence" not culminating in an unsafe "condition" is involved.[23] The District Court found as an unchallenged fact that the unsafe *condition* (the unsecured heavy bearing cap atop the rounded shaft) had existed about *three hours*[24] before it finally fell when petitioner attempted to affix it to a lifting device.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit misapplies the principles enunciated by this Honorable Court as applicable to maritime workers injured aboard vessels "in navigation"; the decision excludes from the seaworthiness warranty of such vessels unseaworthy conditions created during and arising out of repair work. This exclusion is unwarranted and undesirable; *certiorari* should be granted, to the

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[22]Court of Appeals' opinion, Appendix A, p. 16.

[23]Such a case is *Usner v. Luckenbach Overseas Corp.*, No. 675, Oct. Term, 1969, on *certiorari* to the United States Court of Appeals for the Fifth Circuit, *writ* granted February 27, 1970. Petitioner's case is also factually distinguishable from *Parker v. Cargill, Inc.*, 417 F.2d 772 (CCA 5, 1969), *cert. denied*, March 9, 1970; in *Parker* the vessel was a barge *without* crew or motive power that had been *delivered into the exclusive custody of the shipyard*.

[24]Trial Court's Findings of Fact Nos. 8 and 14, Appendix C, pp. 27, 29.

end that the decision of the Court of Appeals is reviewed and reversed, with petitioner's case being remanded to the Appellate Court for consideration of the other legal issues presented by petitioner's appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the Supreme Court of the United States, hereby certify that a copy of this Petition for a Writ of Certiorari, has been served upon all other counsel by depositing the same, properly addressed, in the United States Mails, postage prepaid, at New Orleans, Louisiana, this day of May, 1970.

SAMUEL C. GAINSBURGH

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26365

ROBERT WAYNE PATTERSON,
Appellant,

versus

HUMBLE OIL AND REFINING COMPANY
and "ESSO JAMESTOWN",
Appellees.

YAUN WELDING & MACHINE WORKS, INC.,
Appellant,

versus

MARYLAND CASUALTY COMPANY, ET AL,
Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana

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(February 27, 1970)

Before GEWIN and GODBOLD, Circuit Judges, and CHOATE, Senior District Judge.

CHOATE, Senior District Judge: The appellant Patterson, a ship repairman employed by Yaun Welding & Machine Works, Inc., brought this action against the appellees Humble Oil and its ship, the "ESSO JAMESTOWN", alleging that he had sustained injuries caused by an unseaworthy condition on the vessel "JAMESTOWN" and by the negligence of Humble's employees. Humble denied liability and filed a third party complaint against Yaun seeking indemnity and recovery of costs, attorney's fees, and expenses incurred in defense of the litigation. Yaun impleaded its compensation carrier, Maryland Casualty Company. Maryland denied that it was liable to Yaun for these fees under the terms of the insurance policy.

Patterson was injured when a bearing cap, weighing some 500 pounds, fell from a shaft and struck his foot. The events leading up to the injury may be summarized as follows.

The "JAMESTOWN", upon its arrival in Baton Rouge, Louisiana, was experiencing overheating problems with one of its main bearings. The ship's crew had removed the top half of the bearing (the bearing cap) in order to determine the cause of the difficulty. Inspection disclosed apparent damage to the babbitt surface of the bearing which would require repair. Yaun, an independent contractor engaged by Humble for this purpose, sent a repair gang, which included Patterson, aboard the vessel. The ship's crew, knowing the cap would have to be removed, had left it securely suspended a fraction of an inch above its normal position on the shaft by a chain fall.

The Yaun crew, during the course of their work, lowered the cap onto the shaft and removed the chain fall, thus leaving the cap unsupported on the rounded shaft. The cap remained in this position while other work continued. The foreman of Yaun's crew then ordered Patterson to rig a bridle to the bearing cap so that it could again be lifted by a chain fall and placed on the deck where repairs on the cap could be carried out. While attempting to thread the bridle through an eye bolt on top of the bearing cap, Patterson slipped and fell and, as he did, the bearing cap rolled off the shaft and struck his foot.

After a full trial on the merits, the district court dismissed Patterson's claim for damages, holding, in summary, that there was no negligence on the part of any Humble employee; that Patterson's injury was not caused by a condition of unseaworthiness; and that the injury was caused by the operational negligence of the employer, Yaun, an independent contractor, together with Patterson's own contributory negligence. Alternatively, the court held that no warranty of seaworthiness extended to Patterson regarding the condition in question because his injury was caused by the very defect he had come on board to repair. The district court also held that Humble was entitled to be indemnified by Yaun for the expenses and attorney's fees incurred by Humble in defending the main claim and lastly, that Maryland Casualty, Yaun's insurer, was not liable to Yaun for these sums under the policy of insurance. We turn first to the issues raised by Patterson.

Preliminarily, we note that Patterson does not challenge the district court's finding that there was

no negligence on the part of Humble or its employees. The evidence indicates that the bearing cap was safely secured when tendered by Humble to the independent contractor. Nor does Patterson dispute the court's finding that the cap was negligently placed in an unsafe position during the course of the repairs at the direction and under the supervision of his employer, Yaun. Patterson rests his case on the proposition that the unsecured bearing cap became an unseaworthy condition as a matter of law and that any negligence of his employer "came to rest" thus shifting the responsibility back to the shipowner.

Whether or not Yaun's negligence "came to rest", so as to allow Patterson's claim to escape the disqualification of cases of "instant unseaworthiness",[1] Humble is not liable in the present case. The crucial factor is that he was injured as a result of a "transitory condition *resulting from the course of performing the contract . . .*" *Moye v. Sioux City & New Orleans Barge Lines, Inc.*, 402 F.2d 238 (5th Cir. 1968) (concurring opinion) to repair an unseaworthy condition on the vessel. On these limited facts, no duty of seaworthiness existed regarding the transitory[2] condition.

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[1]This circuit maintains that the warranty of seaworthiness does not extend to cases where the condition complained of is created by operational negligence occurring at the same moment as the injury. Antoine v. Lake Charles Stevedores, Inc., 376 F.2d 443 (5th Cir. 1967), cert. denied 389 U.S. 889; Robichaux v. Kerr McGee Oil Indus., Inc., 376 F.2d 447 (5th Cir. 1967); Grigsby, etc. v. Coastal Marine Service of Texas, Inc., et al., 412 F.2d 1011 (5th Cir. 1969).

[2]Appellant did not fall from a ladder, slip on the deck, or fall prey to any of the other myriad of hazards commonly found aboard a vessel.

See, Parker v. Cargill, Inc., 417 F.2d 772 (5th Cir. 1969).

In *West v. U.S.*, 361 U.S. 118, 80 S.Ct. 189, 4 L.Ed.2d 161 (1959), the claimant argued that a shipowner has a non-delegable duty, not dependent on fault, to provide a "safe place to work." The Court held that no such duty exists, *apart from fault*, and stated that:

> "It appears manifestly unfair to apply the requirement of a safe place to work to the shipowner when he has no control over the ship or the repairs, *and the work of repair in effect creates the danger which makes the place unsafe*." 361 U.S. at 123. Emphasis supplied.

Succinctly stated, the owner's warranty of seaworthiness does not extend to non-crew members regarding transitory conditions created by an outside repair crew during the course of substantial repairs to an existing unseaworthy condition when the transitory condition relates to the subject matter of the repair contract. We emphasize we are not called upon to express an opinion regarding conditions so created that are not so intimately connected with the contract. The warranty "may exist simultaneously as to these very same shore workers concerning conditions over which the operating ship owner (charterer) has a realistic physical responsibility ...." *Moye*, supra, pg. 8, concurring opinion.

The District Court also found that Yaun, appellant's employer, breached its duty to perform its work in a reasonably safe and workmanlike manner and that the shipowner was therefore entitled to recover from Yaun the reasonable attorney's fees and costs incurred in defense of the litigation. See *Strachan Shipping*

Co. v. Koninklyke Nederlandsche S.M., M.V., 324 F.2d 746 (5 Cir. 1963). It is now clear that the claimant's contributory fault or lack of it is not a factor in determining this obligation to indemnify, *SS Lena Luckenbach v. Walsh Stevedoring Co., Inc.*, 395 F.2d 217 (5 Cir. 1968), and the District Court's holding on this point was correct.

Lastly, the District Court held that Yaun was not covered for these fees and expenses under the policy of insurance issued by Maryland.

The policy obligates Maryland

> To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury ... sustained ... by any employee of the insured arising out of and in the course of his employment by the insured....

The phrase "damages because of bodily injury" is defined, in part, as including

> ... damages for which the insured is liable by reason of suits or claims brought against the insured by others to recover the damages obtained from such others because of such bodily injury sustained by employees....

Yaun contends that this language encompasses *all* damages "for which the insured is liable by reason of suits or claims" and is not restricted to damages awarded for bodily injury. Putting aside the question

of whether the fees and expenses here involved are "damages" in the ordinary sense of that term, the quoted language will not support the construction urged by Yaun.

It seems clear that there would be coverage if Yaun were liable to Humble for damages obtained *from* Humble by the employee because of his injuries.* Here, however, while the fees and expenses were assessed *against* Humble, the employee's suit was unsuccessful and no damages were obtained *from* Humble. The pertinent policy provision is clear. It refers only to suits or claims "brought against the insured (Yaun) by others (Humble) to recover the damages *obtained from such others* (Humble) because of such bodily injury ...." No damages were "obtained from" Humble and Humble's present claim against Yaun does not fall within the defined category. The result is that Yaun was not covered for the items in question under the policy.

For the reasons stated, the holdings of the District Court are Affirmed.

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*The District Court reasoned that there was no coverage because Yaun's obligation to Humble arose from a breach of contract (to perform its work in a workmanlike manner) rather than out of bodily injury. However, it would seem that liability under the policy provision in question would arise, if at all, as a result of an indemnity claim of the type here involved and that coverage was not intended to depend on the theory of the claim over against the insured.

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26365

ROBERT WAYNE PATTERSON,
Appellant,

versus

HUMBLE OIL AND REFINING COMPANY and "ESSO JAMESTOWN",
Appellees.

YAUN WELDING & MACHINE WORKS, INC.,
Appellant,

versus

MARYLAND CASUALTY COMPANY, ET AL.,
Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(April 10, 1970)

Before GEWIN and GODBOLD, Circuit Judges, and CHOATE, Senior District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX "C"

Robert Wayne PATTERSON
versus

ESSO JAMESTOWN and Esso, Inc.
No. 780

United States District Court
E. D. Louisiana,
Baton Rouge Division.
Oct. 20, 1967.

WEST, District Judge: This is a suit for damages for personal injuries sustained by plaintiff, Robert Wayne Patterson, as a result of the alleged unseaworthiness of the defendant vessel, "ESSO JAMESTOWN," and/or the alleged negligence of the vessel's owner, the defendant Humble Oil and Refining Company. (The original defendant, Esso, Inc., was dismissed and the proper defendant, Humble Oil and Re-

fining Company, substituted in its place. Plaintiff, at the time of the accident, was employed by Yaun Welding and Machine Works, Inc., an independent contractor employed by Humble to perform certain work aboard the JAMESTOWN. The JAMESTOWN upon arriving at the port of Baton Rouge, was experiencing difficulty with one of her main shaft bearings, and in order to determine the extent of the difficulty, members of the ship's crew rigged a chain fall above the bearing and lifted the top half of the bearing, called the bearing cap, off of the shaft about one-quarter to one-half inch, for the purpose of inspecting the babbitt insert in the bearing. After concluding that the babbitt surface of the bearing had been damaged and that it would be necessary to completely remove both halves of the bearing from the shaft in order to perform the required work, Yaun was called upon, as an independent contractor, to perform this work. As a result of being thus employed, Yaun sent a crew of four men, including plaintiff, aboard the vessel to remove and repair the damaged bearing. While the evidence is in conflict in many respects concerning the position of the bearing when plaintiff first arrived aboard, it is nevertheless the opinion of this Court that the credible evidence preponderates in favor of the conclusion that when plaintiff first arrived aboard the vessel, the top half of the bearing was suspended by a chain fall directly over the shaft, about one-quarter to one-half inch above its usual working site. Members of the ship's crew had rigged the chain fall, unbolted the bearing cap, and raised it, by use of the chain fall, to that position. This bearing cap weighed some 500 pounds or more. It was after the bearing cap had been unbolted and raised by the ship's crew

that their inspection revealed the necessity of the assistance of Yaun in making the necessary repairs to the babbitt surface of the bearing. No further work was done on the bearing or shaft by the ship's crew between the time plaintiff came aboard and the time of the accident, some three hours later. The evidence is also in conflict as to how the bearing cap was handled thereafter, but certain pertinent facts seem quite evident from the record. There is no question but that some time after the Yaun crew commenced its work, the bearing cap was moved by use of the chain fall from its original suspended position over the shaft to a position two or three feet down the shaft. This was necessary in order to make room for the crew to remove the bottom half of the bearing. It is also certain that at some point prior to the accident the bearing cap was lowered by the chain fall and placed on top of the shaft some two or three feet from its original suspended position. It is also quite clear that at some point prior to the accident the chain fall was disengaged from the bearing cap leaving the cap resting without other support on top of the shaft. And lastly, it is established by a clear preponderance of the evidence that while plaintiff was attempting to attach a bridle or choker to the eye bolts of the bearing cap so that it could again be lifted by the chain fall, he slipped and fell and the bearing cap rolled off of the shaft, striking him and causing him injury. While plaintiff argues that the accident was caused by the negligence of Humble, the vessel owner, there is simply no evidence whatsoever to support such a position. No employee of Humble, and no member of the ship's crew, had a thing to do with placing the bearing cap, unsupported, on top of the shaft. No member of the ship's

crew had anything to do with moving or touching the shaft or the bearing after the bearing cap had been first lifted from the shaft and safely suspended by the chain fall. The ship's crew turned the job over to the Yaun crew with the bearing cap safely suspended above the shaft by the chain fall. Whatever change in position of the bearing cap took place after that was the sole responsibility of the Yaun crew. There was not the slightest evidence to support a claim of negligence on the part of any member of the crew of the JAMESTOWN, and thus plaintiff's claim, insofar as it is predicated on alleged negligence of Humble or its employees must fall. But a much more serious question is presented on plaintiff's claim for damages based upon the alleged unseaworthiness of the vessel JAMESTOWN. In short it is plaintiff's contention that the placing of the bearing cap in a precarious position on top of the shaft by the Yaun crew constituted negligence on their part, and the fact that the bearing cap remained in that precarious position for some three hours prior to the accident rendered the vessel unseaworthy during that period of time. Plaintiff then concludes that since it was this alleged unseaworthy condition, i. e., the precarious position of the bearing cap on the shaft, that caused his injuries, he is entitled to recover therefor from the vessel and her owner.

[1] When a plaintiff sues for injuries allegedly sustained as a result of an unseaworthy condition of a vessel, the burden is, of course, upon him to prove his claim by a preponderance of the evidence.

The Court concludes that plaintiff has failed to carry this burden. Plaintiff does not claim that he was injured

because of any part of the ship's hull, gear, tackle, appliances or appurtenances. His only claim of unseaworthiness is based upon the contention that the Yaun repair crew, called upon by the defendant to repair a damaged bearing cap aboard the vessel JAMESTOWN, committed an act of negligence when they, the repair crew, placed the bearing cap unsupported upon the shaft of this vessel and allowed it to remain in that position for about three hours prior to the accident. Plaintiff contends that this act of negligence, which he says was committed and came to rest about three hours prior to the accident, created an unseaworthy condition, i.e., caused the bearing cap to be left in a precarious place rendering unsafe the place where the repair crew had to work, and that three hours after the act of negligence was committed and had come to rest, the plaintiff was injured as a result of the unseaworthy condition caused by the negligence.

[2] There can, of course, no longer be any doubt that a shipowner owes a nondelegable duty to furnish a seaworthy vessel, and that this duty extends to intermediary employers who are performing a portion of the ship's work. Generally speaking this warranty of seaworthiness runs in favor of longshoremen and repairmen alike. Seas Shipping Co. v. Sieracki, 328 U.S. 878, 66 S.Ct. 1116, 90 L.Ed. 1646 (1946); Pope and Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953). But when the unseaworthy condition is brought about by the negligence of a fellow employee of the injured repairman, then the question of when the act of negligence was committed in relation to when the accident occurred becomes important, and indeed, controlling. Antoine v. Lake Charles Steve-

dores, Inc., et al., 376 F.2d 443 (CA 5-1967); Robichaux v. Kerr McGee Oil Industries, Inc., 376 F.2d 447 (CA 5-1967). The conclusion of the Court in *Antoine* was:

> "* * * that the operational negligence of the employee of an independent contractor, occurring at the moment of injury to a co-worker, does not render the vessel unseaworthy."

And in *Robichaux*, the Court concluded:

> "* * * if there is an improper use of seaworthy equipment by the intermediary employees, resulting in injury to a worker, his claim might come squarely within the doctrine of Sieracki, supra, depending of course, upon whether the injury came at the very moment of the negligent use, or after the negligence of the fellow worker had come to rest and the equipment had been left in an unsafe condition. See Antoine v. Lake Charles Stevedores, 376 F.2d 443 (5th Cir. 1967), decided this day."

[3] *Antoine* and *Robichaux* being the latest expressions of the Appellate Court in this Circuit on the question of operational negligence are, of course, controlling in this case. As of now, at least, the law by which this Court is bound is clear, i. e., if an employee of an intermediary employer is injured as a result of operational negligence of a co-employee occurring at the time of the accident, such operational negligence does not create an unseaworthy condition for which the shipowner can be held liable. But if the negligence of the fellow worker had come to rest, and as a re-

sult of the negligence the ship's gear or equipment was left in an unsafe condition causing injury to the plaintiff, the ship and its owner may be liable for injuries resulting from the unseaworthy condition thus created. When the negligence occurred in relation to the happening of the accident is, of course, a question of fact. While there is conflicting evidence on many of the salient points involved in this case, this Court finds that the evidence preponderates in favor of the following findings of fact.

FINDINGS OF FACT

1. Plaintiff, at the time of his injury, was an employee of Yaun Welding and Machine Works, Inc., an independent contractor.

2. At the time of the accident the defendant vessel JAMESTOWN was owned and operated by the defendant, Humble Oil and Refining Company.

3. When the JAMESTOWN arrived at the Port of Baton Rouge, she was experiencing difficulty with one of her shaft bearings, and in order to determine the extent of the damage to the bearing, the members of the ship's crew rigged up a chain fall, unbolted the top half, or cap, of the bearing, and raised it a fraction of an inch by means of the chain fall so that the babbitt surface of the bearing cap could be inspected.

4. This inspection revealed that there was some apparent damage to the babbitt surface of the bearing, and rather than have the ship's crew attempt to re-

pair it, Yaun Welding and Machine Works, Inc., was called upon to make the repairs.

5. Yaun sent a crew of four men, including the plaintiff, to the vessel to make the repairs.

6. When the Yaun crew boarded the vessel, the bearing cap, which weighed 500 pounds or more, was safely suspended by the chain fall a fraction of an inch above its normal position on the shaft.

7. In order to remove the bottom half of the bearing from underneath the shaft, it was necessary to lift the weight of the shaft off of the bearing. This would permit the bottom half of the bearing to be rolled out from under the shaft.

8. Prior to attempting to slightly raise the shaft in order to lift its weight off of the bottom half of the bearing, the foreman of Yaun's crew, Mr. Perkins, ordered his men to move the suspended bearing cap away from its position over its normal working site, and to let it down on the shaft, two or three feet forward of its normal position. It was thus moved, by use of the chain fall, and then was lowered by use of the same chain fall and made to rest on the shaft. Either at that time, or some time later, the chain fall was disengaged from the bearing cap and the cap continued to rest on the shaft with no support other than its own weight holding it in its position on top of the shaft.

9. In order to rotate the bottom half of the bearing out from under the shaft it was necessary to exert

an upward pressure on the shaft, thus relieving the bottom half of the bearing of the weight which the shaft was exerting upon it. While there is conflict in the evidence on this point, the Court concludes that this was probably done by use of a heavy jack, while the lower half of the bearing was being handled with the help of the chain fall that had previously been used to lift the bearing cap off of the shaft and to place it on top of the shaft at the position it was in just prior to the accident.

10. The lower half of the bearing was removed, and its babbitt surface was worked on, and the crew was in the process of relocating the bottom half of the bearing in its normal working position just prior to the happening of the accident in which the plaintiff was injured.

11. As the lower half of the bearing was being replaced under the shaft, the foreman, Mr. Perkins, instructed the crew to rig up the bridle on the bearing cap which was resting on the shaft so that it could then be lifted by the chain fall and placed on the floor, or deck, so that its bearing surface could be repaired.

12. Pursuant to this order, plaintiff proceeded to attempt to thread the bridle through the eye bolts on the bearing cap, and while attempting to do so, he slipped and fell, and as he fell, the bearing cap rolled over on the shaft and fell off of the shaft, striking plaintiff on the foot, causing him the injuries of which he now complains.

13. There is no credible evidence in the record to

lead to the conclusion that the owner, operators, or members of the crew of the JAMESTOWN were guilty of any negligence whatsoever causing or contributing to the cause of this accident.

14. Approximately three hours elapsed between the time Yaun's crew moved the bearing cap from over its working site to its location on the shaft from which it fell to the time when it fell and injured plaintiff.

15. The foreman of the Yaun crew was guilty of negligence when he ordered or permitted the chain fall to be disengaged from the bearing cap and allowed it to rest, unsupported, on top of the shaft, and he was guilty of continuing negligence for allowing it to so remain from the time it was placed there until the accident occurred. He was again guilty of a separate act of negligence when he ordered or permitted plaintiff to rig up the bridle on the bearing cap without making sure that the necessary precautions were taken to see that the bearing cap was made fast during that operation. And plaintiff himself was guilty of negligence at the moment of the accident for failing to take the necessary precautions to see that the bearing cap was held in some manner before he attempted to thread the bridle through the eye bolts.

16. The original act of negligence, i. e., leaving the bearing cap unsupported on the shaft, did not cease when the chain fall was disengaged from the bearing cap, but this act of negligence continued right down to the moment of the accident, and was a proximate cause of the accident itself. The negligence of Yaun's foreman in ordering or permitting the members of

his crew, including plaintiff, to work upon the unsecured bearing cap, i. e., to attempt to rig up a bridle thereon without first ascertaining that it was in a safe position to do so, was an act of negligence occurring at the time of the accident itself and was also a proximate cause of the accident and resulting injuries to plaintiff. And finally, the negligence of the plaintiff himself in attempting to work on the bearing cap when it was in a position that he also knew was unsafe was an act of negligence on his part occurring at the precise moment of the accident which was a proximate cause of the accident and resulting injuries.

17. None of the previously enumerated acts of negligence had come to rest prior to the accident, but instead were all acts of operational negligence on the part of the independent contractor, Yaun, or on the part of persons for whom Yaun was responsible, which continued right down to the moment of the injury, and which, acting together, constituted the proximate cause of this accident.

18. At the time the Yaun crew reported aboard the JAMESTOWN, the vessel was indeed unseaworthy, not because of anything the Yaun crew did, but because of the fact that a shaft bearing had been disengaged from the shaft by the ship's crew, and the top half of the bearing was suspended by a chain fall above the shaft. As the vessel then stood, she was unseaworthy and unable to go to sea, and it was for the purpose of correcting this very unseaworthy condition that the plaintiff and the other members of the Yaun crew were called aboard.

19. The procedure to be used in correcting this unseaworthy condition, that is, in repairing and replacing the bearing in order to make the vessel seaworthy and operable, was entirely within the discretion of and under the control of the Yaun repair crew.

20. The vessel JAMESTOWN was not taken out of navigation for these repairs to be made but remained a vessel in navigation at all times pertinent to this suit.

21. Plaintiff was injured while in the course of correcting the very unseaworthy condition which he was called aboard to correct, and the proximate cause of the accident was the negligent acts committed by him and his co-workers while attempting to correct the unseaworthy condition.

CONCLUSIONS OF LAW

[4-6] 1. The Court has jurisdiction over this matter and venue is properly laid in the Eastern District of Louisiana.

2. The Court finds as a matter of law that neither defendant, Humble Oil and Refining Company, nor anyone for whose action said defendant is liable, was guilty of any negligence which in any way caused or contributed to the cause of the accident and resulting injuries herein involved.

3. The Court finds as a matter of law that the sole proximate cause of plaintiff's injuries was the concurrent negligence of plaintiff himself and his co-workers, all employees of the independent contractor, Yaun Welding and Machine Company.

4. The Court, having found as a matter of fact that the operational negligence of the plaintiff and his co-workers did not come to rest prior to the accident, and did not, prior to the accident, create an unseaworthy condition, but instead continued down to the very moment of the accident, now finds as a matter of law that the operational negligence of the plaintiff and his co-workers did not render the vessel JAMESTOWN unseaworthy. Antoine v. Lake Charles Stevedores, Inc., et al., supra; Robichaux v. K. McGee Oil Industries, Inc., supra.

5. When a repairman, such as plaintiff, is called aboard a vessel to repair an unseaworthy condition then existing, there is, of course, no warranty of seaworthiness running in his favor with respect to the unseaworthy condition which he is called upon to repair, and if he is injured as a result of the very unseaworthy condition he is attempting to correct, he may not recover for his injuries from the shipowner on the grounds of unseaworthiness. Pinion v. Mississippi Shipping Company, 156 F.Supp. 652 (ED La. - 1957); Bruszewski v. Isthmian S. S. Co., 163 F.2d 720 (CA 3 - 1947). The Court, having found as a matter of fact, that the vessel was unseaworthy because of a damaged bearing rather than because of any act of negligence on the part of the plaintiff or his co-workers, and that plaintiff was aboard the vessel to help correct this known unseaworthy condition, and that he was injured in the course thereof, now finds, as a matter of law, that in respect to this bearing and the unseaworthiness caused by its defective condition, and with respect to the activities engaged in by the

plaintiff and his co-workers to correct this condition, plaintiff was not entitled to a warranty of seaworthiness. Quite the contrary, by virtue of the fact that he was called aboard to repair the bearing in order to make the vessel seaworthy, he was advised of the fact that the unseaworthy condition existed, and after he came aboard, when he saw the bearing first suspended over the shaft and later, with his help, resting on the shaft, he was assured of the existence of the unseaworthy condition. The vessel could not operate until the bearing was repaired and replaced in its working site. Plaintiff was injured while attempting to repair this unseaworthy condition, and cannot now recover because of the very unseaworthy condition which he was attempting to repair.

6. The Court having concluded, as a matter of law, that the negligence which resulted in plaintiff's injury was in no way attributable to defendant Humble, nor to anyone for whom Humble is legally liable, and that plaintiff was not injured as a result of a breach of warranty of seaworthiness, he is not entitled to recover for his injuries from either the vessel ESSO JAMESTOWN or its owner and operator, Humble Oil and Refining Company.

7. Since the Court concludes that the plaintiff's injuries were caused solely and entirely by the negligence of Yaun's employees, and since this negligence constitutes a breach of Yaun's duty to perform its work in a workmanlike manner, the Court finds, as a matter of law, that Humble Oil and Refining Company is entitled to recover from Yaun, pursuant to

its third-party demand, reasonable attorney fees and costs incurred in defense of this suit. Strachan Shipping Company v. Koninklyke Nederlandsche S.M.N.V., 324 F.2d 746 (CA 5-1963); American Export Lines v. Norfolk Shipbuilding and Drydock Corporation, 336 F.2d 525 (CA 4-1964); Damanti v. A/S Inger, 314 F.2d 395 (CA 2-1963).

8. Since the Court finds that Yaun's obligation to reimburse Humble a reasonable amount for attorney fees and costs incurred in defense of this action arises out of a breach of contract rather than out of bodily injury sustained by the plaintiff, the Court further finds as a matter of law that the third-party defendant, Maryland Casualty Company, is not obligated under its policy No. 01-690-320 to indemnify Yaun for such attorney fees and costs, and hence, Yaun's third-party claim against Maryland Casualty Company must fail.

9. Since the Court finds that the plaintiff is not entitled to recover in this suit, the intervention filed by Maryland Casualty Company for recovery of workmen's compensation benefits previously paid to the plaintiff must, as a matter of law, be dismissed.

10. In the event Humble and Yaun are unable to agree on what is reasonable for attorney fees and costs, the Court will, upon application of either party, hear evidence pertaining thereto.

Judgment will be entered accordingly.